

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

KEVIN SCHEUNEMANN

Plaintiff,

v.

Case No. 2:09-cv-1134
Chief Judge Charles N. Clevert, Jr.

ASSOCIATED CREDITORS
EXCHANGE, INC., a/k/a ACE

Defendant.

***REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S
MOTION FOR JUDGMENT ON THE PLEADINGS***

Defendant Associated Creditors Exchange, Inc. by and through its attorneys Robert S. Phillips and Scott G. Thomas of Thomas & Associates submits its reply to plaintiff's response to this defendant's motion for judgment on the pleadings. With respect to said reply, this defendant states as follows:

1. This defendant filed a motion for judgment on the pleadings on the grounds that both Counts I & II purport to state causes of action based upon violations of the Wisconsin Consumer Act – Debt Collection, Wis. Stats. § 427.101, et seq., and the Fair Debt Collection Practices Act 15 U.S.C. § 1692, et seq., respectively.

2. The gist of the motion is that the debt the defendant attempted to collect arose from a commercial loan, not a consumer transaction. Therefore, neither statute applies and these counts should be dismissed. Further, since Counts III, IV & V are derived from Counts I & II, they should be dismissed as well. At the very least the dismissal of the FDCPA action would extinguish the federal court's jurisdiction over the remaining causes of action.

3. Plaintiff responds to the motion by contending:

a. Matthew J. Berardi's affidavit filed in support of defendant's motion for judgment on the pleadings should be stricken because Mr. Berardi's is not an employee of U.S. Bank.

b. Notwithstanding Berardi's affidavit, the transactions resulting in the outstanding debt were primarily for personal, household, and family purposes.

4. First, as to Mr. Berardi's affidavit, plaintiff's reliance upon Wis. Stats. § 908.03(6) is misplaced. It is a business exception rule to hearsay and has nothing to do with representations set for in an affidavit based upon an affiant's personal knowledge. With respect to the case relied upon by plaintiff, *Palisades Collection, LLC vs. Kalal*, 2010 WI APP 38 (sic) this defendant was unable to locate the case with the citation provided. In short, contrary to plaintiff's contentions, there is no justification for striking Mr. Berardi's affidavit.

5. As to plaintiff's assertion that the subject debt was for purchases of items and services for personal, household and family purposes, it is based upon a self serving and unsubstantiated statement at best. (See paragraph 4 of plaintiff's affidavit in support of his response to defendant's motion).

6. Further, this statement is contra to the terms and conditions set forth in plaintiff's credit card contract with U.S. Bank National Association. Attached to and in support of defendant's reply brief is an exemplar copy plaintiff's credit card contract with U.S. Bank National Association as Exhibit "A". This contract provides in relevant part:

ACCOUNT FEATURES AND YOUR USE OF THE ACCOUNT

1. Business Use - Charging privileges on the Card and Account are provided by the Issuer pursuant to a contract with your Company and are subject to the Agreement.

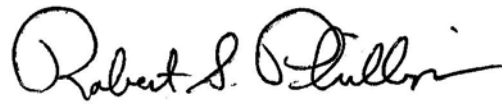
The Card and Account are to be used only by you for the purpose of charging purchases of goods and services primarily for or incidental to the business of your Company.
(emphasis added)

7. Based upon the above and attached it is clear that the credit card debt which the defendant was attempting to collect was a commercial and not a consumer debt.

WHEREFORE: Defendant Associated Creditors Exchange, Inc. prays that the court enter an order granting movant's motion for judgment on the pleadings.

Dated this 24th day of May, 2010.

THOMAS & ASSOCIATES



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PROOF OF SERVICE

I hereby certify that on May 24, 2010, I served an exact copy of the within document including all attachments on parties as indicated below by ECF Filing pursuant to Fed. R. Civ. P. 5.



By _____
THOMAS & ASSOCIATES

TO: Kevin Scheunemann, pro se plaintiff